85-495

No. _____ ____

In The
Supreme Court of the United States
October Term, 1985

Ansonia Board of Education and
Nicholas Collicelli, Dr. Charles J. Connors,
Kenneth Eaton, William Evans, Del Matricaria,
Susan Schumacher, Faith Tingley, and
Robert E. Zuraw,

Petitioners,

v.

Ronald Philbrook,

Respondent.

Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Second Circuit

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On the Brief:

Robert J. Murphy
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QUESTIONS PRESENTED

1. Did the circuit court err in holding that Respondent established a *prima facie* case of religious discrimination under Title VII by refusing to provide Respondent with additional paid leave for religious observance?

2. Does Title VII require an employer to accept an employee's proposal where the employer and employee have each proposed a reasonable accommodation of the employee's religious beliefs?

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IN THE
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NICHOLAS COLLICELLI, DR. CHARLES J. CONNORS,
KENNETH EATON, WILLIAM EVANS, DEL MATRICARIA,
SUSAN SCHUMACHER, FAITH TINGLEY, and
ROBERT E. ZURAW,

Petitioners,

v.

RONALD PHILBROOK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals entered March 7, 1985, the denial of the petition for rehearing issued June 7, 1985, and the opinion of the district court are set out in the Appendix. The decision of the court of appeals is reported at 757 F.2d 476. The decision of the district court is unreported.

JURISDICTION

The decision of the court of appeals reversing the judgment of the district court was entered March 7, 1985. A petition for rehearing was denied on June 7, 1985. Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including September 25, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1). The jurisdiction of the district court was based on 28 U.S.C. §1331 and §1343 and 42 U.S.C. §2000e-5 (f) (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment I of the United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Title VII of the Civil Rights Act of 1964, As Amended (Excerpts)

Section 703(a), 42 U.S.C. §2000e-2(a):

It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

Section 701(j), 42 U.S.C. §2000e(j):

The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

STATEMENT OF CASE

Respondent, Ronald Philbrook, has been employed by petitioner, Ansonia Board of Education, as a teacher since 1962. In 1968, Philbrook became a member of the Worldwide Church of God, the tenents of which require that members refrain from servile work on designated holy days as a condition of receiving eternal life. As a member of the Worldwide Church of God, Philbrook has been required to refrain from secular employment on up to six holy days occurring during the school year. Since the 1967-68 school year, collective bargaining agreements between the board of education and the Ansonia Federation of Teachers, the union representing members of the Ansonia teachers' bargaining unit, have entitled Philbrook to three days of paid annual leave to observe religious holidays. Philbrook and other teachers in Ansonia are provided eighteen additional days of paid leave cumulative to 180 days for illness and other enumerated purposes including three days of leave to attend to "necessary personal business." These three days of paid leave, under the terms of the governing collective bargaining agreements, may not be used for those reasons for which paid leave is otherwise provided.

In order to accommodate Philbrook's need to refrain from work on more than three days, the board of education has allowed him to be absent without pay beyond the three days of paid leave guaranteed under the collective bargaining agreements. From the 1970-71 school year to the present, Philbrook has consistently availed himself of the religious leave sections of the agreement taking three days of paid leave in each school year. It has been the practice of the school board to deduct a day's pay from Philbrook's salary for each day in excess of the three claimed by Philbrook to have been taken for the observance of holidays.

PROCEEDINGS BELOW

Philbrook filed his complaint with the district court alleging that the school board's refusal to grant him additional days of paid leave for religious observance violated Title VII and the First Amendment. The district court accepted jurisdiction under 28 U.S.C. §1331 and §1334 and under 42 U.S.C. §2000e-5(f) (3). After reviewing this Court's decision in *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63 (1977), the district court concluded that, as in *Hardison,* there was no statutory basis for granting Philbrook's request because in essence Philbrook was seeking preferential treatment rather than accommodation (pp.34a-36a *infra*).

Philbrook then appealed the district court's decision. The Second Circuit reversed the judgement of the district court holding that Philbrook established a *prima facie* case of religious discrimination by demonstrating that the school board's policy of limiting paid leave for religious reasons was in conflict with Philbrook's need to observe religious holidays on scheduled work days and that the school board's practice of giving Philbrook unpaid leave was discriminatory (pp.11a-12a *infra*). The court further held that Title VII requires an employer to accept an employee's proposal where the employer and employee each propose a reasonable accommodation (pp.14a-15a *infra*). The panel remanded the case to the district court for a determination of whether accommodating Philbrook's religious practices by granting him additional paid leave, as he proposed, would constitute undue hardship within the meaning of Title VII (p.16a *infra*).

The Board of Education's petition for a re-hearing was denied on June 7, 1985 (p.25a *infra*).

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS HOLDING THAT THE RESPONDENT ESTABLISHED A *PRIMA FACIE* CASE OF RELIGIOUS DISCRIMINATION CONFLICTS WITH THE DECISION OF THE TENTH CIRCUIT COURT OF APPEALS ON A VIRTUALLY IDENTICAL ISSUE.

In order to establish a *prima facie* case of religious discrimination, a plaintiff must prove (1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she has informed the employer of this belief; and (3) he or she was disciplined for failing to comply with the conflicting employment requirement. *Turpen v. Missouri-Kansas-Texas Railroad Co.*, 736 F.2d 1022 (5th Cir. 1984), *Brener v. Diagnostic Center Hospital*, 671 F.2d 141 (5th Cir. 1982).

The Tenth Circuit has applied this standard to facts virtually identical to those of the present case. *Pinsker v. Joint District No. 28J*, 735 F.2d 388 (10th Cir. 1984). In *Pinsker*, a tenured teacher who was a member of the Jewish faith argued that the defendant school board's leave policies infringed on the practice of his religion because the policies failed to provide him with paid leave for all religious holidays. The school board's leave policy in *Pinsker* provided teachers with twelve days of paid leave, all of which a teacher might use for sick leave and two days of which a teacher might use for personal business. Pinsker was allowed to take two days of paid leave to observe Jewish holidays and additional days of unpaid leave for any other holiday occurring during the school year. He sought three additional days of paid leave arguing that the school board failed to reasonably accommodate his religious practices.

On appeal from the district court's decision dismissing the Title VII claim, the Tenth Circuit held that Pinsker had not established a *prima facie* case of religious discrimination under Title VII because the school board's "policies and practices jeopardized neither Pinsker's job nor his observance of religious holidays." *Id.* at 391. Thus, Pinsker failed to satisfy the first and third prongs of the test for establishing a *prima facie* case under Title VII: his religious needs did not conflict with the board's practice of providing him with additional unpaid leave for religious observance, and he was not disciplined for his absenses. *Id.* at 390.

In arriving at its decision, the Tenth Circuit reasoned that teachers are likely to have different religious beliefs and degrees of devotion and that a school board cannot be expected to negotiate leave policies broad enough to suit every employee's religious needs. *Id.* at 391. The court also noted that Title VII does not require an employer to spare an employee all costs associated with religious practices. *Id. See also, EEOC v. Caribe Hilton Hotel*, 597 F. Supp. 1007 (D.P.R. 1984) (stating that Title VII does not require an employer to pay an employee for time not worked). The court thereby implied that a school board's decision to provide unpaid rather than paid leave should not be characterized as discriminatory or disciplinary.

Applied to the facts of this case, the Tenth Circuit's decision in *Pinsker* would require a dismissal of Philbrook's Title VII claim for his failure to establish a *prima facie* case of religious discrimination. No conflict arose between the school board's job attendance requirements and Philbrook's religious needs by virtue of the school board's providing three days of paid leave and a number of days of unpaid leave. In this regard, it is indisputable that a work rule requiring employees to work as a pre-condition to receiving compensation, fairly applied to all employees, would not constitute discrimination within the meaning of Title VII. Thus, an employer who chose not to provide any form of paid leave, but allowed employees days off without pay for secular or religious reasons would not be engaged in employment discrimination; nor would an employer who chose to provide employees one day of paid leave and a number of days of unpaid leave to attend to secular or religious business be engaged in such discrimination. No conflict between the job attendance requirements and the employee's religious practices would arise because the attendance requirements have been waived by the employer. Accordingly, Philbrook was simply denied an extra benefit which was also unavailable to other teachers. Considering the heterogeneity of the labor force, as pointed out in *Pinsker,* and the school board's duty to treat all employees equally, unpaid leave was a compatible practice enabling Philbrook to practice his religious beliefs without detriment to his job or career.

The Second Circuit, in contradiction to the *Pinsker* decision, held that a conflict existed between Philbrook's religious observance and the school board's unpaid leave practices.[1] Moreover, the court held that the school board's action in giving Philbrook unpaid leave was disciplinary and akin to discriminatory firing.

Neither case law nor the legislative history of the statute support the Second Circuit's expansive view that an employer discriminates within the meaning of Title VII if it allows unpaid leave for religious observance but refuses to pay a teacher for not working. *Philbrook v. Ansonia Board of Education,* 757 F.2d 476, 488 (2d Cir. 1985) (Pollack J. dissenting). *See also, Pinsker v. Joint District No. 28J,* 735 F.2d 338 (10th Cir.1984); *EEOC v. Carribe Hilton Hotel,* 597 F. Supp. 1007 (D.P.R. 1984). Furthermore, support for the Second Circuit's holding cannot be gleaned from decisions of this Court construing Title VII.

This Court has stated that Title VII was enacted to ensure that similarly situated employees are not treated differently solely because they differ with respect to religion. *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63, 71 (1977). This Court has further stated that "Title VII strives to achieve equality of opportunity by rooting out 'artificial, arbitrary and unnecessary' employer-created barriers to professional development." *Connecticut v. Teal,* 457 U.S. 440, 451 (1982). As the dissent points out, the leave policy in the present case does not make distinctions between Philbrook and other employees or place a barrier to Philbrook's professional development. *Philbrook v. Ansonia Board of Education,* 757 F.2d 476, 489 (2d Cir. 1985) (Pollack J. dissenting). Instead, the policy mandates that all teachers are entitled to a limited amount of paid leave to observe religious holidays.

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[1]The court did not refer to *Pinsker* in its analysis of Philbrook's Title VII claim. The dissent, however, noted the conflict.

Rather than being treated in a discriminatory fashion, Philbrook has received favored treatment by the school board. Under the terms of the collective bargaining agreement, employees who take leave for religious observance are already entitled to three more days of paid leave than other employees. While some disparity in treatment between religious observers and non-religious observers may be justifiable as an attempt to accommodate religious beliefs, this Court has noted that Title VII does not contemplate preferential treatment for minorities and that discrimination is proscribed when it is directed against majorities as well as minorities. *Trans World Airlines, Inc. v. Hardison,* 432 U.S. at 81 (privileges may not be allocated according to religious beliefs). *See also, Estate of Thorton v. Caldor Inc.,* __U.S.__, 105 S.Ct. 2914 (1985) (concurring opinion). The school board's practice of granting Philbrook unpaid leave for religious observance could be viewed as preferential treatment although other employees are not deprived of benefits because of this treatment. In no sense, however, has Philbrook been discriminated against because of his religious beliefs or practices.

In summary, what Philbrook seeks is not an accommodation of his religious practices, but a subsidy of those practices. Philbrook contends that because the school board has allotted to employees what is arguably a generous portion of paid leave, it can afford to be more generous and underwrite all of his absences arising for religious reasons. It is submitted that Title VII does not compel this result any more than it would require an employer who provides no form of paid leave to compensate employees for absences taken to observe religious holidays. However, following the rationale expressed in the Second Circuit's opinion to its logical conclusion, Title VII would require an employer to provide this form of subsidy, and to the extent that the statute has been correctly construed, a serious question as to its constitutionality under the Establishment Clause arises.

In light of *Pinsker,* this Court's action is needed to ensure consistent application of Title VII in accordance with the intent of Congress and to prevent preferential treatment on the basis of religion.

II. THE DECISION OF THE COURT OF APPEALS REQUIRING AN EMPLOYER TO ACCEPT AN EMPLOYEE'S PROPOSAL OF REASONABLE ACCOMMODATION CONFLICTS WITH THE DECISIONS OF OTHER FEDERAL COURTS.

Title VII imposes upon employers a duty to reasonably accommodate employees' religious beliefs. The Fifth Circuit in *Brener v. Diagnostic Center Hospital*[2], 671 F.2d 141 (5th Cir. 1982), has interpreted this provision to include the requirement that an employee make a good faith effort to satisfy his religious needs through means offered by the employer. Similarly, the Eighth Circuit has recognized that an employee has a duty to attempt to accommodate his beliefs and to cooperate with the employer's attempts at reasonable accommodation. *Chrysler Corp. v. Mann,* 561 F.2d 1285 (8th Cir. 1977) *cert. denied* 434 U.S. 1039 (1977). In *Pinsker,* the Tenth Circuit noted that Title VII does not require employers to accommodate the religious practices of an employee in exactly the same way the employee would like to be accommodated. 735 F.2d at 390. *See also, EEOC v. Caribe Hilton,* 597 F.Supp. 1007 (D.P.R. 1984).

This Court has on one occasion interpreted Title VII's prohibition against religious discrimination and has concluded that an employer fulfills its duty under Title VII by offering employees a reasonable accommodation of their religious practices. *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63 at 78. However, there is no suggestion in *Hardison* that an employer must accept an employee's proposal. Moreover, a rule that an employer must implement an employee's accommodation proposal arguably violates the Establishment Clause of the First Amendment. In a recent decision this Court struck down a Connecticut statute which unconditionally required that employers grant an

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[2]The Second Circuit erroneously concluded that the *Brener* Court, by implication, approved the concept that Title VII requires an employer to accept an employee's proposal. The court failed to address the language in that opinion which specifies that an employee has a duty to attempt to accept the employer's proposal.

employee's request for leave to observe the Sabbath.[3] *Estate of Thorton v. Caldor, Inc.*, __U.S.__, 105 S.Ct.2914 (1985). This Court concluded that it is unconstitutional to compel an employer to favor religious interests without considering the employer's reasonable accommodation proposal by guaranteeing that employees may decide on which day of the week to be absent for observance of the Sabbath. *Id.* at 2918. While the majority in *Caldor* did not discuss the impact that its decision would have on Title VII, the concurring Justices noted that the reasonable accommodation provisions of Title VII may remain intact because these provisions do not require *absolute* accommodation of the employee's religious belief.[4] *Id.* at 2919.

Notwithstanding possible constitutional problems and a lack of support for its decision,[5] the court of appeals in the present case concluded that an employer is required to accept an employee's proposal where the employer and employee have both made proposals of reasonable accommodation. Apart from being in direct conflict with decisions of other circuits, the Second Circuit's decision is not supported by the language of the statute or by the statute's legislative history.

As this Court has pointed out, Congress amended Title VII to require "reasonable accommodation" of employee religious beliefs without specifying the degree of accommodation required. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 75 (1977). The legislative history of the amendment is similarly silent about the meaning of "reasonable accommodation." *Id.* Its sponsor, however, suggested that the amendment was designed to provide a means of encouraging employer and employee to achieve understanding and to make adjustments accommodating the needs of both parties. 118 Cong. Rec. 705-706 (Sen. Randolf) (1972).

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[3]This decision was rendered after the Second Circuit's decision in the present case.

[4]The implication is that Title VII may be unconstitutional if it advances religion by requiring preferential treatment based upon religious beliefs.

[5]Though not cited in the Second Circuit's opinion, one district court has similarly held that an employer must accept an employee's proposal. The case is now on appeal to the Ninth Circuit. *See, American Postal Workers v. Postmaster General*, No. 84-2388 (9th Cir. argued Aug. 15, 1985).

A plain reading of the statutory requirement of "reasonable accommodation" also warrants the conclusion that Congress intended that the interest of both parties be taken into account as long as the religious beliefs of the employees can be accommodated. The court of appeals in the present case, however, gives priority to employee proposals despite the fact that the employer has provided a reasonable accommodation which it feels is less onerous. In this connection, the Second Circuit's interpretation will frustrate enforcement of the statute which is designed to foster cooperation and conciliation between employers and employees. *See, Trans World Airlines, Inc. v. Hardison*, 432 U.S. at 72 N.6 (*quoting* 110 Cong. Rec. 13,079-13,080 (1964) (Sen. Clark)). As a result of the Second Circuit's holding, employees will be encouraged to ignore the interest and reasonable suggestions of their employers and instead insist upon an accommodation they prefer. It is likely that increased litigation will result because employees will be less inclined to accept a proposed accommodation no matter how reasonable the proposal is.

The Second Circuit's decision cannot be reconciled with the views of other courts of appeal and is not supported by decisions of this Court. The court's interpretation is contrary to the plain meaning of the statute, and may result in increased litigation and uncertainty for employers. Therefore, this Court's action is needed to resolve the dispute between the circuits and to provide a correct interpretation of the federal statute.

CONCLUSION

For the foregoing reasons, Petitioners respectfully submit that this petition should be granted and a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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Appendix A

OPINION, UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 397 — August Term, 1984

(Argued: November 14, 1984 Decided: March 7, 1985)

Docket No. 84-7548

RONALD PHILBROOK,

Appellant,

— v. —

ANSONIA BOARD OF EDUCATION AND NICHOLAS COLLICELLI, DR. CHARLES J. CONNORS, KENNETH EATON, WILLIAM EVANS, DEL MATRICARIA, SUSAN SCHUMACHER, FAITH TINGLEY, ROBERT E. ZURAW, ANSONIAL FEDERATION OF TEACHERS, LOCAL1012, AFL-CIO, JOSE NEVES, KATHLEEN ROBERTS, MARY GHIRARDINI, DENNIS GLEASON, DOMINICK GOLIA, MAUREEN WILKINSON, AND GEORGETTE WILLIAMS,

Appellees.

Before:

OAKES and KEARSE, *Circuit Judges,* and POLLACK, *District Judge.**

Appeal from a judgment of the United States District Court for the District of Connecticut, Thomas F. Murphy, *Judge,* holding that a school teacher had failed to prove his claim of religious discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2, and the First Amendment.

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* Of the Southern District of New York, sitting by designation.

Reversed and remanded.

David N. Rosen, New Haven, CT, *for Appellant.*

Thomas N. Sullivan, Hartford, CT (Robert J. Murphy, Hartford, CT, of counsel), *for Appellees Ansonia Board of Education and the Individual School Board Members.*

Robert F. McWeeney, Hartford, CT, *for Appellees Ansonia Federation of Teachers, Local 1012, and Union Officers.*

OAKES, *Circuit Judge:*

Ronald Philbrook, a high school teacher in Ansonia, Connecticut, appeals from a judgment of the United States District Court for the District of Connecticut, Thomas F. Murphy, Judge, after a bench trial, finding that he failed to prove his claim of religious discrimination in employment against the Ansonia Board of Education (the "school board") and the Ansonia Federation of Teachers, Local 1012 (the "union"). Philbrook, a member of the Worldwide Church of God, claims that the school board's leave policies violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2 (1982), and the free exercise clause of the First Amendment. Reaching only the statutory issue, we reverse and remand.

BACKGROUND

Appellant has taught typing and business at Ansonia High School since 1962. Some time later he began studying and observing the teachings of the Worldwide Church of God. In February, 1968, he was baptized into the church, of which he remains a member. The tenets of the church require members to refrain from secular employment on certain designated holy days each year. These holy days are determined with reference to the Hebrew calendar. Thus they often fall on different days in different years. Several of these holy days usually fall during a school week. Appellant estimated that if he is to observe the required holy days he will have to miss approximately six school days each year.

The school board's leave policies, as outlined in collective bargaining agreements with the union, have changed over time:

A. In 1966, the school board and the union, then recognized as the exclusive bargaining representative for Ansonia's teachers, entered into an agreement that provided for five days' leave "for personal and or legal reasons." The agreement also provided for accident and sick leave but said nothing about leave for religious reasons.

B. The 1967-1968 contract provided for annual leave of 18 days, cumulative to a total of 150 days, for "personal illness, illness in the immediate family which requires the presence of the teacher, . . . compulsory court appearance as party or witness." It also provided that teachers could use annual leave for other reasons, such as "weddings," a "death in the immediate family," and "personal reasons," limiting weddings and death in the family to a specified number of days and allowing "personal reasons" leave only "at [the] Sup[erintenden]t's discretion." The agreement also stated that teachers could take up to three days' leave "for observance of Religious Holy Days which church laws make obligatory." Religious leave, however, could not be charged or accumulated as annual leave.

C. The 1968-1969 contract contained many of the same provisions, yet provided for three days per year for "legitimate and necessary personal business at the teacher's discretion," and included the three days for religious observance as annual leave days, which presumably were cumulative.

While none of these early agreements expressly stated that personal business leave could not be used for religious observance, it appears that the school board interpreted these categories as exclusive. Later contracts makes the exclusivity explicit. The 1969-1970 contract again allowed three days for personal business and three days for religious holidays, but the latter were no longer part of annual leave. Moreover, it stated that "[n]o annual leave, including accumulated days, shall be used for absence due to Religious Holidays in excess of 3 days per year." The 1970-1971 contract added a provision stating that personal business leave

days could not be used for any of a number of enumerated activities, including "[a]ny religious activity."[1]

The next modification of the restrictions on personal business leave is evinced by the agreement for 1978 through 1982. The contract still provided for three days, but only one was at the teacher's discretion. The other two would be authorized only after the teacher gave the reason for his or her absence. The current agreement, in effect until 1985, contains the same leave provisions.[2]

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[1] The agreement for 1971-1972 also changed the salary deduction for unauthorized absences. Previously, a teacher would have been docked 1/200 of his or her salary for an unauthorized absence, but after 1971 the deduction was increased to 1/180 of the teacher's annual salary.

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[2] The current contract, which, one would have to say, speaks by the book, provides in pertinent part:

A. Annual Leave

Eighteen (18) days of annual leave cumulative to 180 days shall be granted for personal illness and/or illness in the immediate family (spouse, children, parents, and family members residing in household), which requires the presence of the professional staff member, and within the limits stated below:

	limit of 2 days per
*1. Death in the immediate family	5 day limit each time
2. Family funeral attendance	1 day each time
3. Friend funeral attendance	1 day each time — limit of 2 days per year
*4. Immediate family wedding	1 day each time
*5. Immediate family graduation	1 day each time
*6. Immediate family religious ceremony (Ordination, Vows, Bar Mitzvah, Bas Mitzvah, First Communion, Baptism)	1 day each time
7. Official delegate to national veterans organization	1 day per year
8. Official delegate (President and/or Business Agent) to national or state teachers organization	1 day per year — without charge

[Footnote continued on following page]

[Footnote continued from previous page]

9. Official delegate (other than President and/or Business Agent) — (limit of 3) to national or state teachers organization	1 day per year
10. Mandated religious observance	3 days per year — without charge

Those holidays which are required by and obligatory due to written denominational law shall be considered as authorized leave and shall not be charged to annual leave, including accumulated days. No annual leave, including accumulated days, shall be used for absence due to religious holidays in excess of three days per year.

11. Necessary personal business	3 days total per year
a. Necessary personal business	1 day per year

Granted at the discretion of the professional staff member with 48 hour notification to the immediate supervisor. Professional staff member will note personal day on the form provided by Board of Education.

b. Necessary personal business with approval	2 days per year

Professional staff member must request the days for personal business on a form provided by the Board of Education forty-eight (48) hours prior to such leave. Reasons for such leave may be stated in general terms if the professional staff member is concerned with protecting the confidential nature of the personal business. The professional staff member shall make all reasonable efforts to plan and conduct personal business so that it does not conflict with assigned professional duties. Exceptions regarding the forty-eight (48) hour notice provision and/or use of prepared form may be made in cases of emergencies.

Necessary personal business shall not include (without limitations):

1. Marriage attendance or participation;
2. Day following marriage or wedding trip;
3. Attendance or participation in a sporting or recreational event;
4. Any religious observance;
5. Travel associated with any provision of annual leave;
6. Purposes set forth under annual leave or another leave provision of this contract.

*NOTE: Immediate family shall be defined as spouse, children, parents, stepparents, grandparents, brothers, sisters, parents-in-law, family members residing in the professional staff member's household.

Absence due to any judicial proceeding in which the professional staff member is a plaintiff or defendant or is a witness under subpeona shall be considered as authorized leave and shall not be charged to annual leave, including accumulated days.

[Footnote continued on following page]

[Footnote continued from previous page]

Absence due to jury duty shall be considered as authorized leave and shall not be charged to annual leave. Immediately upon notice of the possibility of the teacher serving jury duty, such notice shall be communicated to the teacher's principal. All teachers shall make every effort to be excused from jury duty.

The Board may require satisfactory proof of illness after a professional staff member is absent for four (4) consecutive school days on account of illness. Such proof of illness may also be required of a professional staff member's immediate family member if the professional staff member is absent for four (4) consecutive school days on account of the immediate family member's illness.

For absence other than for personal illness and not authorized herein, a salary deduction equal to 1/180th of the annual salary shall be made.

Any travel by a professional staff member, conducted in connection with and/or at the time of any school holiday, vacation, school commencement in September or school termination in June shall be arranged where possible, in advance, so as not to conflict with assigned or required professional duties.

From 1967 through 1976, appellant took unauthorized absences for religious holidays in excess of three days per year, for which the school board docked appellant's salary. Although some of the contracts during this period appear to leave the reason for personal business absences to the teacher's discretion, appellant claims to have taken no personal business leave on church holy days. In 1976, however, appellant stopped taking unauthorized leaves for religious reasons, claiming that his family could not sustain the financial strain of the docked salary. He began to schedule required hospital visits on church holy days, and on several occasions he worked on a holy day.

Appellant claims to have sought relief from both school authorities and the union. The school board has always allowed appellant to take unpaid leave for religious holy days, but appellant has repeatedly suggested two other arrangements. On the one hand, appellant has asked that the school board allow personal business leave be used for religious observance. On the other hand, appellant has offered to pay the full cost of a substitute instead of being docked the larger pro rata salary deduction for observing religious holy days in excess of the three allotted by contract.[3] Moreover, he has agreed to supervise the substitute and to make up for days missed by doing meaningful school

[3] In 1984, it cost $30 per day to hire a substitute, while the school board would have docked appellant over $130 for one unauthorized absence.

work at other times. The school board has consistently rejected both proposals.

Appellant's legal battle seeking accommodation of his religious practices began in 1973 when he filed a complaint against the school board and the union with the Connecticut Commission on Human Rights and Opportunities ("CHRO") and the Equal Employment Opportunity Commission ("EEOC"). The CHRO found probable cause to believe that the school board's refusal to allow personal business leave to be used for religious observance constituted religious discrimination, and attempted conciliation. The CHRO's conciliation agreement proposed that the school board and the union agree to "amend [the leave provisions] . . . so not to deny employees the use of their accumulated personal business days for observance of Religious Holidays." The agreement also provided appellant with back pay compensation. The school board rejected the proposed conciliation.[4]

Soon thereafter the EEOC assumed jurisdiction and also found probable cause. The EEOC attempted conciliation between appellant and the union, but these efforts failed.[5] On September 19, 1977, the EEOC issued a right-to-sue letter.

Appellant filed his complaint in federal court on December 16, 1977, alleging that the school board's prohibition from using personal business leave for religious observance violated Title VII and the First Amendment. In addition to charging the school board and the union, appellant added the individual members of the school board and various present and former union officers as defendants. All parties moved for summary judgment, but on April 8, 1983, the district court denied the motions, finding that material facts were in dispute.

[4] After the Connecticut Supreme Court decided *Corey v. Avco-Lycoming Division*, 163 Conn. 309, 307 A.2d 155 (1972), *cert. denied*, 409 U.S. 1116 (1973), limiting an employer's duty to accommodate employees' religious beliefs under the Connecticut Fair Employment Practice Act, the CHRO ended its conciliation efforts.

[5] In 1975, the union instituted a grievance proceeding against the school board on behalf of appellant. The only issue before the arbitrator, however, was the meaning of the Ansonia collective bargaining agreement. The arbitrator denied the grievance.

After a two-day trial, the district court held that appellant had failed to prove religious discrimination. The court's opinion first outlines the facts that were not in dispute. After reviewing appellant's testimony concerning his religious practices, the court declined to find appellant insincere in his religious beliefs, though it had "some doubts of his sincerity." The court made no finding, stating that "we draw no inference of insincerity without more facts. Neither do we find he was sincere." After reviewing what it deemed relevant Supreme Court case law, the court concluded that appellant failed to prove religious discrimination, because he had "not been placed by the School Board or any of its members or by the Union or any defendant officers thereof, in a position of violating his religion or losing his job." In addition, the court stated that it had no jurisdiction over the individual school board members or union officers under Title VII or 42 U.S.C. § 1983.

DISCUSSION

Appellant's Prima Facie Case

In this case of first impression, we begin by examining Title VII's prohibition against religious discrimination. Under Title VII, an employer cannot discriminate against any employee on the basis of the employee's religious beliefs unless the employer shows that he cannot "reasonably accommodate" the employee's religious needs without "undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j).[6] The parties assume

[6] 42 U.S.C. § 2000e(j) provides:

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. § 2000e-2(a) (1) provides, in pertinent part:

(a) It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

The legislative history provides little assistance in interpreting § 2000e(j). *See Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63, 74-75 & n.9 (1977).

and we agree that Title VII requires the plaintiff to make out a prima facie case of discrimination, after which the burden shifts onto the employer to show that it cannot reasonably accommodate the plaintiff without undue hardship on the conduct of the employer's business. *See, e.g., Turpen v. Missouri-Kansas-Texas Railroad Co.,* 736 F.2d 1022, 1026 (5th Cir. 1984); *Anderson v. General Dynamics Convair Aerospace Division,* 589 F.2d 397, 401 (9th Cir. 1978), *cert. denied,* 442 U.S. 921 (1979). While the district court omitted to apply this burden of proof sequence or to make the findings required under it, necessitating remand, we state the guidelines for the case on remand.

We first adopt the approach to plaintiff's prima facie case taken by several courts of appeal:

> A plaintiff in a [Title VII] case makes out a prima facie case of religious discrimination by proving: (1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; (3) he or she was disciplined for failure to comply with the conflicting employment requirement.

Turpen, 736 F.2d at 1026; *accord Brown v. General Motors Corp.,* 601 F.2d 956, 959 (8th Cir. 1979); *Anderson,* 589 F.2d at 401; *Redmond v. GAF Corp.,* 574 F.2d 897, 901 (7th Cir. 1978). Moreover, we agree that a finding of probable cause by an administrative agency, such as the EEOC, though not determinative, is admissible to help establish this prima facie case. *See, e.g., Smith v. Universal Services, Inc.,* 454 F.2d 154, 157-58 (5th Cir. 1972). On the record before us plaintiff has almost certainly satisfied this prima facie standard.

We reject the school board's invitation to hold that appellant has failed to establish the sincerity of his religious beliefs. The district court expressly declined to make any such finding. In fact, on the record below, we would be inclined to reverse a finding of insincerity as clearly erroneous.

We acknowledge that it is entirely appropriate, indeed necessary, for a court to engage in analysis of the sincerity — as opposed, of course, to the verity — of someone's religious beliefs in both the free exercise context, *see, e.g., United States*

v. Ballard, 322 U.S. 78, 86 (1944); *Patrick v. LeFevre,* 745 F.2d 153, 157 (2d. Cir. 1984); L. Tribe, *American Constitutional Law* § 14-11, at 859-61 (1979), and the Title VII context. We see no reason for not regarding the standard for sincerity under Title VII as that used in free exercise cases. *See Redmond,* 574 F.2d at 901 n.12; *cf. Lewis v. Califano,* 616 F.2d 73, 77-81 (3d Cir. 1980) (using free exercise standards for determining whether religious belief is a "justifiable cause" for declining surgery under the Social Security regulations). This court has recently held that a sincerity analysis is necessary in order to "differentiat[e] between those beliefs that are held as a matter of conscience and those that are animated by motives of deception and fraud." *Patrick,* 745 F.2d at 157. In *International Society for Krishna Consciousness, Inc. v. Barber,* 650 F.2d 430, 441 (2d Cir. 1981) (citations omitted), we outlined several factors that indicate insincerity, noting that "an adherent's belief would not be 'sincere' if he acts in a manner inconsistent with that belief . . . or if there is evidence that the adherent materially gains by fraudulently hiding secular interests behind a veil of religious doctrine." The *Barber* court also stated that "the religion's size and history" is relevant to the sincerity determination. *Id.* The burden on plaintiff, however, is not a heavy one. We must avoid any test that might turn on "the factfinder's own idea of what a religion should resemble." L. Tribe, *supra,* at 861.

The school board argues that appellant's failure to take unpaid leave on holy days during the past several years shows that appellant has acted in a manner inconsistent with his "beliefs," and therefore that those beliefs were not sincerely held. We cannot agree. From 1968 through 1976 appellant accepted the docking of his pay to take off the holy days for which religious leave was not provided. After 1976 he worked on certain holy days because he could no longer afford the docking of his salary. We find it distinctly unpalatable for the school board to argue that a lack of sincerity was evidenced because after many years of paying for his extra holy days the appellant stopped paying and obeyed the school board's rules that forbade him from engaging in religious activity on extra days away from school. The school board's leave policy forced appellant to act in a way inconsistent with his religious belief. Appellant's claim that he was reacting

to financial pressure rebuts the inference of fraud from his actions. *Cf.* Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities,* 90 Yale L.J. 350, 371 (1980) (arguing that for purposes of disallowing religious tax exemptions there should be "affirmative proof of fraud"); *see also Ballard,* 322 U.S. at 92-98 (Jackson, J., dissenting).

In addition, we note that, while the district court had "some doubts of his sincerity because of his vagueness and claimed poor memory of when and where he attended religious services," it wisely declined to make a finding of insincerity without "a full exposition of facts," *Patrick,* 745 F.2d at 157. Moreover, it correctly noted that even if appellant was not a regular churchgoer, it "would have trouble" in making a finding of insincerity. Appellant's financial compromise and failure to attend services regularly would not, by themselves, mean that he does not believe that he should not work on holy days. *Cf. Thomas v. Review Board,* 450 U.S. 707, 715 (1981) (courts are incompetent to arbitrate intrafaith differences where a church member's insincerity is at issue).

Turning to the remaining requirements of plaintiff's prima facie showing, appellant gave unrebutted testimony that he informed the school board and the union of his need to be absent on religious holy days, although it is not clear when the union became aware of appellant's needs. On remand, such a finding might be necessary to determine the amount of back pay appellant is entitled to receive, assuming that issue is reached. In addition, it seems clear that appellant suffered a detriment from the conflict between his religious practices and the employment requirements. The district court placed much reliance on the fact that appellant was not forced into a choice between his job and his religious beliefs, but we hold that such a choice cannot be distinguished from the choice here between giving up a portion of his salary and his religious beliefs. While we acknowledge that some courts have stated that discharge was required to make a prima facie showing of discrimination, *see, e.g., Brown,* 601 F.2d at 959, Title VII prohibits not only discrimination in hiring and firing but also discrimination "with respect to compensation, terms, conditions or privileges."

Finally, appellees claim that *General Electric Co. v. Gilbert,* 429 U.S. 125 (1976), bars appellant from making out a prima facie case of discrimination by simply claiming that appellee's leave policy is "less than all inclusive." In *Gilbert,* the Supreme Court held that an employer's failure to include pregnancy benefits in its health care plan was not, by itself, sex discrimination. The Court at one point stated that "pregnancy-related disabilities constitute an *addditional* risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike." *Id.* at 139 (emphasis in original). According to appellees, appellant's need for more than three days' leave for religious holy days is an "additional risk" unique to his faith.

Appellee's reliance on *Gilbert* is misplaced. *Gilbert* addresses whether a classification based on pregnancy was discriminatory on its face and whether the employees had shown that the health care plan had a discriminatory effect on the basis of sex in terms of benefits received. The language appellees rely on its simply part of an explanation why the employees had failed to show that the General Electric Plan had a discriminatory effect. Here, however, appellant has offered evidence that the Ansonia leave policy facially discriminates on the basis of religion; the collective bargaining agreements in effect since 1969 have explicitly stated that personal business leave days may not be used for "[a]ny religious activity" and thus have afforded some teachers all the leave they need for religious reasons while not extending that benefit to members of religious groups that have more than three holy days per year. Yet even if appellant's claims are analyzed as solely alleging discriminatory effect in this respect, appellees' agrument proves too much. Any religious belief can be characterized as an "additional risk." Title VII, at least as applied to religious discrimination, expressly assigns employers a duty to accommodate those beliefs. Moreover, the Supreme Court has recently held that Congress's enactment of the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), not only overturned the specific holding in *Gilbert* "but also rejected the test of discrimination employed by the Court in that case." *Newport News Shipbuilding & Dry Dock Co. v. EEOC,* 103 S. Ct. 2622, 2627 (1983).

"Reasonable Accommodation" and "Undue Hardship"

The crucial issues in this case remaining for determination involve interpreting the meaning of and relationship between the terms "reasonable accommodation" and "undue hardship." The central precedent, of course, is *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63 (1977), the only case in which the Supreme Court has addressed "reasonable accommodation" and "undue hardship" under Title VII. In *Hardison,* the employee, like appellant Philbrook here, a member of the Worldwide Church of God, sought to be excused from work on Saturdays, the church's sabbath. *Id.* at 67. The employer operated a large maintenance and overhaul base around the clock. The employees' shift preferences were resolved on the basis of a seniority system outlined in a collective bargaining agreement. Hardison's problems arose when he transferred into a new division and lost his seniority. Prior to the transfer, he had used his seniority to observe the sabbath regularly. After the transfer, however, the union would not agree to a change of work assignments — which would allow Hardison to have Saturdays off — in violation of the seniority provisions of the collective bargaining agreement. *Id.* at 68. Hardison also proposed to work four days a week, but the proposal was rejected by TWA. The Court noted that

> Hardison's job was essential, and on weekends he was the only available person on his shift to perform it. To leave the position empty would have impaired supply shop functions, which were critical to airline operations; to fill Hardison's position with a supervisor or an employee from another area would simply have undermanned another operation; and to employ someone not regularly assigned to work Saturdays would have required TWA to pay premium wages.

Id. at 68-69.

The Supreme Court held that the failure to accept these proposed accommodations did not violate Title VII. Addressing what the Court considered the "principal issue" in the case, *id.* at 83 n.14, the Court concluded that the duty to accommodate does not take precedence over seniority rights enunciated in a collective bargaining agreement. *Id.* at 83. And, turning to the issue

more pertinent to this case, the Court held that Hardison's four-day work week proposals involved costs to TWA that amounted to "undue hardship." *Id.* at 84. The Court stated that "[t]o require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship." *Id.* Finally, the Court noted that giving Hardison Saturdays off by "incurring extra costs to secure a replacement for Hardison" would constitute a "privilege . . . allocated according to religious beliefs," *id.* at 84-85, which the Court saw as a form of reverse discrimination.

Hardison did not sound a death knell to the employer's duty to accommodate under Title VII. In *Anderson,* 589 F.2d at 402, the Ninth Circuit rejected a union's argument that any hypothetical hardship constitutes "undue hardship," noting that [u]ndue means something greater than hardship. Undue hardship cannot be proved by assumptions nor by opinions based on hypothetical facts." Similarly, the *Brown* court held that speculative costs to the employer could not discharge its burden of proving undue hardship. 601 F.2d at 961.

The school board argues that we should find that its longstanding accommodation of three days of paid leave and additional days of unpaid leave for religious observance constitutes a reasonable accommodation and thus satisfies its duty to accommodate, citing the Tenth Circuit's decision in *Pinsker v. Joint District No. 28J,* 735 F.2d 388, 391 (10th Cir. 1984). The *Pinsker* court held that a policy allowing two days of paid leave for religious reasons and additional days of unpaid leave satisfied the duty to accommodate. We presume that Ansonia's leave policy is also "reasonable." And if Title VII's duty to accommodate were to be defined without reference to undue hardship, we would hold that the school board has satisfied its burden. The duty to accommodate, however, cannot be defined without reference to undue hardship. In many circumstances, more than one accommodation could be called "reasonable." Where the employer and the employee each propose a reasonable accommodation, Title VII requires the employer to accept the proposal the employee prefers unless that accommodation causes undue hardship on the employer's conduct of his business.

Although the courts interpreting Title VII's duty to accommodate have never expressly articulated this point, their analyses are consistent with this approach. In most cases, the court is called upon to assess only the employee's proposal; the court does not have to assess the propriety of the employer's offering one accommodation but rejecting the employee's proposed accommodation. *See Hardison, supra; Turpen, supra.* Nevertheless, the Fifth Circuit in *Turpen* did state, as we have suggested above, that the reasonableness and undue hardship questions were "interlocking." *Id.* at 1026. Previously, in *Brener v. Diagnostic Center Hospital,* 671 F.2d 141 (5th Cir. 1982), the Fifth Circuit had interpreted the duty to accommodate in the same way we do today. The *Brener* court analyzed the reasonableness of the employer's proposed accommodation, *id.* at 145-46, but went on to examine the employee's proposed accommodations to determine whether any did not cause the employer undue hardship. The implication is that, even if the employer proposes a reasonable accommodation it has not satisfied its duty to accommodate unless the employee's suggested accommodations would lead to greater than de minimis cost. The EEOC's recent guidelines on religious discrimination — while not dispositive of the interpretation of Title VII, *see Gilbert,* 429 U.S. at 140-42 — also support the approach we above suggest. *See* 29 C.F.R. § 1605.2(c) (2) (1984).[7]

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[7] Section 1605.2(c) (2) provides:

(2) When there is more than one method of accommodation available which would not cause undue hardship, the Commission will determine whether the accommodation offered is reasonable by examining:

(i) The alternatives for accommodation considered by the employer or labor organization; and

(ii) The alternatives for accommodation, if any, actually offered to the individual requiring accommodation. Some alternatives for accommodating religious practices might disadvantage the individual with respect to his or her employment opportunites [*sic*], such as compensation, terms, conditions, or privileges of employment. Therefore, when there is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities.

As noted, appellant has offered two proposed accommodations — the use of personal business leave for religious observance and the payment of the cost of a substitute in exchange for not being docked salary for religious leave in excess of three days. On remand the district court must determine whether accepting either of appellant's proposed accommodations would cause undue hardship. We note, however, that on the record before us it appears that neither of the accommodations would lead to greater than de minimis costs.

Appellant clearly prefers that the school board allow him to use personal business leave for religious holy days. The critical factual question concerning this proposal is the past and current scope of the personal business leave provisions. As noted earlier, from 1968 through 1977 three personal business days could be taken at the teacher's discretion, and from 1977 to the present, at least one could be taken at the teacher's discretion. This leaves in the air whether any such day may be taken for any reason except those specifically mentioned, such as religious reasons. Thus, the question is open whether they are usable for various secular purposes, including activities not inconsistent with religious observance. The provision does include the words "legitimate and necessary," but left unsaid is whether leaving the reason to the teacher's discretion abrogates this limiting language. Appellant claims that the provision allows attendance at charity meetings, while the school board argues that its scope is much more narrow. One of the appellant's exhibits at trial — entitled "Teacher Absence Report" — indicates that many teachers have taken at least one personal business day a year and some more than one. It also appears that personal business days are taken more frequently than religious holy days. The presence of a contract provision that allows leave for limited secular activities, such as sick leave or leave for court appearances, does not show that additional paid leave for religious observance in lieu of personal business leave would not cause undue hardship. Employers and unions must be free to outline specific types of paid leaves in a contract without the threat of being charged with religious discrimination. But if the personal business leave provision is as broad as appellant claims, it becomes difficult to believe that dropping the religious exception causes undue hardship.[1]

Even if the district court finds that the personal business accommodation would lead to undue hardship — or if the school board and the union were to agree to take the personal business leave provisions out of the contract altogether — the district court must assess the cost of accepting appellant's substitute proposal. Appellant has offered to pay for a substitute and even to work other days to make up for the time missed. While there is some testimony below concerning the cost of using substitutes, the court never focused on the cost of appellant's proposed accommodation. The Superintendent of Schools testified that it is difficult to find certified substitutes, especially those qualified to teach typing and business; that the quality of learning with a substitute is low; that substitutes often have difficulty keeping discipline; and that when substitutes teach classroom equipment is often damaged. Yet several questions still must be addressed. Because presumably appellant would know about his upcoming religious holy days well in advance, it is possible that he can work out an arrangement that avoids the traditional problems of finding a qualified substitute at the last minute. While we recognize the difficulty of discipline in a high school classroom, it may also be that discipline and teaching difficulties can be avoided in a business course by having appellant closely supervise the substitute.

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[1] On remand, the district court must make findings about the use of personal business leave from 1968 through the present. Appellant does not only seek prospective relief; he also seeks back pay.

In its brief on appeal, the school board seems to assume that the burden is on appellant to show that the personal business accommodation would not cause undue hardship. It is not: once appellant has made out a prima facie case, the school board has the burden of showing that an accommodation *would* cause undue hardship.

On the record before us, we decline to accept the school board's argument that the substitute accommodation as a matter of law poses greater than de minimis costs. This case thus might well be distinguished from *Hardison*. The *Hardison* Court held that a need for premium pay or a loss of efficiency can cause undue hardship. Under the proposed substitute accommodation, the school board would not be paying premium wages. Appellant is not asking to have his religious activities subsidized, as the school board claims. Appellant has offered to pay the cost of the substitute and to make up for time off: appellant does not ask for payment for time when he is not working.[9] Moreover, we are not ready to hold that the school board has shown that there will be a greater than de minimis loss in efficiency. The *Hardison* Court held that using a supervisor or an employee from another area amounted to a greater than de minimis cost because it left other operations undermanned. The same problems may not arise under the substitute accommodation. One would suppose that the school system has the ability to find qualified substitutes. If appellant communicates with the substitute before and after the days he must miss, there may well be no appreciable loss in the quality of education, where the number of additional

[9] The district court also thought appellant wanted something for nothing. Certainly it was overlooking his offer to work extra hours to make up for days missed. The court noted an analogous federal statute providing a government employee with "abstention from work during certain periods of time" for religious reasons if the employee "engage[s] in overtime work for time lost," 5 U.S.C. § 5550a (1982), yet the court incorrectly stated that appellant "agrees with everything but the work part." The statute appears to support, not weaken, appellant's claim.

substitute days appears to be three.[10] *Cf. Turpen*, 736 F.2d at 1028 & n.6 (holding that it was not clearly erroneous for the district court to find that a substitute accommodation caused undue hardship when there was no built-in system for substitution).

[10] 29 C.F.R. § 1605.2(d) (1) (i) advocates the use of "voluntary substitutes" as an example of reasonable accommodation without undue hardship:

(i) Voluntary Substitutes and "Swaps"

Reasonable accommodation without undue hardship is generally possible where a voluntary substitute with substantially similar qualifications is available. One means of substitution is the voluntary swap. In a number of cases, the securing of a substitute has been left entirely up to the individual seeking the accommodation. The Commission believes that the obligation to accommodate requires that employers and labor organizations facilitate the securing of a voluntary substitute with substantially similar qualifications. Some means of doing this which employers and labor organizations should consider are: to publicize policies regarding accommodation and voluntary substitution; to promote an atmosphere in which such substitutions are favorably regarded; to provide a central file, bulletin board or other means for matching voluntary substitutes with positions for which substitutes are needed.

The school board also suggests that accommodating appellant would constitute preferential treatment. We disagree. While we acknowledge the cautionary language of the Supreme Court in *Hardison*, we do not interpret *Hardison* as vitiating the employer's duty to accommodate. Appellant's proposal for the use of personal business leave for religious observance is not one seeking preferential treatment. He is asking the school board and the union to change its leave policy as applied to everyone. Nor would his substitute accommodation allocate a privilege "according to religious beliefs." *Hardison*, 432 U.S. at 85. Appellant has asked to be treated differently; he has not asked for privileged treatment. In exchange for additional days off, he is willing to make up for time off *and* pay for the substitute. Differential treatment cannot be equated with privileged treatment. Accepting the school board's argument would "preclude all forms of accommodation and defeat the very purpose behind § 2000e(j)." *Brown*, 601 F.2d at 962.[11]

[11] Perhaps *Hardison* may be read as equating "undue hardship" with preferential treatment. That is to say, accepting an accommodation that would lead to greater than de minimis costs to the employer constitutes under *Hardison* preferential treatment when looked at from the perspective of the employees. Yet accepting a proposal that would not cause undue hardship, does not constitute preferential treatment. We need not reach this question, however.

Moreover, in light of our remand, we do not address the hypothetical question whether accepting either of appellant's proposed accommodations constitutes an unconstitutional establishment of religion. We do note, however, that several courts of appeals have held that Title VII's duty to accommodate does not run afoul of the First Amendment. *See McDaniel v. Essex International, Inc.*, 696 F.2d 34, 37 (6th Cir. 1982); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1244-46 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981); *Nottelson v. Smith Steel Workers*, 643 F.2d 445, 453-55 (7th Cir.), *cert. denied*, 454 U.S. 1046 (1981); *Hardison v. Trans World Airlines, Inc.*, 527 F.2d 33, 43-44 (8th Cir. 1975), *rev'd on other grounds*, 432 U.S. 63 (1977).

Union Liability

Finally, we reject the union's argument that we find it not liable for any religious discrimination on the record before us. Title VII places a duty on unions not "to cause or attempt to cause an employer to discriminate against an individual." 42 U.S.C. § 2000e-2(c) (3). We have stated previously that a union's liability depends on its "responsibility for the discrimination." *EEOC v. Enterprise Association Steamfitters Local No. 638*, 542 F.2d 579, 586 (2d Cir. 1976), *cert. denied*, 430 U.S. 911 (1977). This conclusion is consistent with that of other courts. *See, e.g., Hardison v. Trans World Airlines, Inc.*, 527 F.2d 33, 42-43 (8th Cir. 1975), *rev'd on other grounds*, 432 U.S. 63 (1977). In *Hardison*, the Eighth Circuit wrote that "the union may be held liable if it purposefully acts or refuses to act in a manner which prevents or obstructs a reasonable accommodation by the employer so as to cause the employer to discriminate." *Id.* at 42. In this case, various union officers testified that they had proposed changes in the collective bargaining agreement's leave policies, but all were rejected. Appellant claims that the union never really pushed for these changes. The union did join appellant in seeking arbitration on appellant's leave policy grievance, but, at the same time, it appears that the union declined to enter into an EEOC conciliation agreement with appellant. Clearly, any further discussion of the issue must await a more detailed development of the facts.[12]

Judgment reversed and remanded for proceedings not inconsistent with the foregoing.

[12] The district court held it had no "jurisdiction" over the individual school board members and the union officers. Appellant does not raise this issue on appeal and, therefore, we do not address it.

While we reach only the Title VII issues, the First Amendment issues remain open, if appellant should lose on the Title VII issues on remand.

POLLACK, *Senior District Judge* (dissenting):

I dissent and vote to affirm on the unassailable facts found below, substantially for the reasons and authorities contained in District Judge Thomas F. Murphy's persuasive opinion.

The issue in this case is whether the School Board should be forced to pay a teacher for not working. There is no indication that the School Board, the Union, or the collective bargaining agreement intended to discriminate against anyone, including plaintiff, on the basis of religion. The School Board and Union, and the membership of the latter, adopted a facially neutral policy giving each employee three days of paid religious leave and three days of paid secular personal leave, which were not to be interchangeable. If an employee wished to take additional religious leave, he was privileged to do so at his own cost without suffering any impact on his employment status.

The majority views the School Board's policy as one that facially discriminates on the basis of religion because it "affords some teachers all the leave they need for religious reasons but does not extend that benefit to members of religious groups that have more than three holy days per year." However, neither case law nor the legislative history of the statute support the majority's expansive position that an employer "discriminates" within the meaning of Title VII if he refuses to give an employee more than three paid religious days when the employee desires more paid leave.

The legislative history makes it clear that Title VII was not concerned with the "no work-no pay" situation. Rather, as the Senate Floor managers explained, the statute was concerned with discriminatory practices, i.e., the situation where an employer

> "refuse[d] to hire or to discharge any individual or otherwise to discriminate against him with respect to compensation or terms or conditions of employment because of such individual's race, color, religion, sex, or national origin *in such a way as to deprive them of employment opportunities or otherwise affect adversely their employment status.*"

110 Cong. Rec. 7212 (1964) (April 8, 1964) (Interpretative Memorandum of Title VII submitted by Senators Case and Clark) (emphasis added).

Moreover, the nature of the discrimination that lies at the base of Title VII matters was starkly explained in language that admits of no confusion. The Senate sponsors stated that:

> "To discriminate is to make distinctions or differences in the treatment of employees . . ."

Id. at 7218.

Supreme Court opinions also emphasize that Congress enacted Title VII in order to "remov[e] artificial, arbitrary, and unnecessary barriers to employment . . ." *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). As the Court reiterated in *Connecticut v. Teal*, 457 U.S. 440 (1982), "Title VII strives to achieve equality of opportunity by rooting out 'artificial, arbitrary and unnecessary' employer-created barriers to *professional development.*" *Id.* at 451 (emphasis added).

The leave policy at issue here does not make distinctions between employees or deny plaintiff the opportunity to pursue his employment and yet have time off to observe his religious holy days. This is not a case where plaintiff is denied employment because his religious beliefs preclude him from working on certain days. *See, e.g., Reid v. Memphis Publishing Co.*, 468 F.2d 346 (6th Cir. 1972). Nor is plaintiff subject to discharge because his religion forbids him to work on these days. *See, e.g., Brown v. General Motors Corp.*, 601 F.2d 956 (1979). Likewise, the policy has no adverse impact on plaintiff's opportunities for advancement; plaintiff has not been denied a promotion because of his religious beliefs. *See, e.g., Haring v. Blumenthal*, 471 F. Supp. 1172 (S.D.N.Y. 1979).

The School Board's policy neither deprives the plaintiff of employment opportunities nor adversely affects his employment status. As Judge Murphy succinctly stated, "[P]laintiff could go without let or hindrance whenever and wherever he wished" (Op. at 13) — but at his own expense. Since the policy does not "discriminate" within Title VII's use and meaning of that term, the statute may not be invoked against the School Board.

It is also clear that the Board has agreeably and reasonably accommodated the plaintiff. Recently, in *Pinsker v. Joint District*

No. 28J, 735 F.2d 388 (10th Cir. 1984), the Tenth Circuit held that a school board made a reasonable accommodation by permitting a teacher to take unpaid leave for religious observance. In *Pinsker*, teachers had a pool of 12 days of paid leave, of which two could be used for "special leave" purposes including religious observance. Plaintiff argued that Title VII required the Board to adopt a leave policy that was less burdensome to religious practices. The court disagreed, stating that the statute does not require employees to "accommodate the employee's practices in such a way that spares the employee any cost whatsoever." *Id.* at 390-91.

> In *Pinsker*, the court also held that
>
> "[d]efendant's policy and practices jeopardized neither [plaintiff's] job nor his observation of religious holidays. Because teachers are likely to have not only different religions but also different degrees of devotion to their religions, a school district cannot be expected to negotiate leave policies broad enough to suit every employee's religious needs perfectly."

Id. at 391.

The neutral leave policy challenged here is embodied in a valid collective bargaining agreement. "Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy . . ." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79 (1977). Where, as here, the agreement neither impairs employment status nor imposes any artificial, arbitrary, and unnecessary barriers to employment, then, as the Supreme Court stated in *Hardison*, "we do not believe that the duty to accommodate requires [the employer] to take steps inconsistent with the otherwise valid [collective bargaining agreement]." *Id.* Paid leave from employment is neither contractually nor Constitutionally mandated.

Since the School Board's leave policy does not discriminate on the basis of religion, plaintiff failed — as early as the close of his case — to make out a prima facie case. Consequently, the judgment of dismissal should be affirmed.

Appendix B

ORDER, UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of June one thousand nine hundred and eighty five.

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RONALD PHILBROOK,

Appellant,

v.

84-7548

ANSONIA BOARD OF EDUCATION AND NICHOLAS COLLICELLI, DR. CHARLES J. CONNORS, KENNETH EATON, WILLIAM EVANS, DEL MATRICARIA, SUSAN SCHUMACHER, FAITH TINGLEY, ROBERT E. ZURAW, ANSONIA FEDERATION OF TEACHERS, LOCAL 1012, AFL-CIO, JOSE NEVES, KATHLEEN ROBERTS, MARY GHIRARDINI, DENNIS GLEASON, DOMINICK GOLIA, MAUREEN WILKINSON, AND GEORGETTE WILLIAMS,

Appellees.

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A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendants-appellees, Ansonia Board of Education, et al.,

Upon consideration by the panel that heard the appeal, it is

Ordered that the said petition for rehearing is DENIED.

It is further noted that a poll of the judges in regular active service having been taken on the suggestion for rehearing in banc and there being no majority in favor thereof, rehearing in banc is DENIED.

Elaine B. Goldsmith
Clerk

Appendix C

MEMORANDUM, UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

RONALD PHILBROOK
Plaintiff

vs. CIVIL ACTION

ANSONIA BOARD OF EDUCATION, and NICHOLAS COLLICELLI, DR. CHARLES J. CONNORS, KENNETH EATON, WILLIAM EVANS, DEL MATRICARIA, and SUSAN SCHUMACHER (as President), and FAITH TINGLEY (as Secretary), individually and as members of said Board, ROBERT E. ZURAW, individually and as Superintendent of the Ansonia School System, and ANSONIA FEDERATION OF TEACHERS, LOCAL 1012, AFL-CIO, and JOSE NEVES, KATHLEEN ROBERTS, MARY GHIRARDINI, DENNIS GLEASON, DOMINICK BROGOLIA, MAUREEN WILKINSON, and GEORGETTE WILLIAMS, individually and as officers of said Local
Defendants

N 77-489

MEMORANDUM

MURPHY, D.J.

Ronald Philbrook, a school teacher, sues his employer Ansonia Board of Education and its individual members and also his Union, Ansonia Federation of Teachers, Local 1012 AFL-CIO, and its individual officers for violation of his First Amendment right of the free exercise of religion pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq,* and 42 U.S.C. §1983. Our jurisdiction is derived from 28 U.S.C. §1331 and §1343 and 42 U.S.C. §2000e-5 (f) (3).

Whether we have jurisdiction of the individual members of the

School District under "1983" and the officers of the Union without allegations of diversity of citizenship will be discussed later as will the question of the immunity of such individuals under *Harlow vs. Fitzgerald,* 457 U.S. 800 (1982).

Most of the facts were not in dispute in this two day trial including the necessary jurisdictional prerequisites of filing with the EEOC and its right to sue letter.[1]

Plaintiff's complaint alleges that defendants have caused him to lose pay for the days he is required to be absent from work for religious observances although no pay is deducted for non religious personal business. This practice he claims violates his rights under the First Amendment and Title VII of the Civil Rights Act of 1964.

Plaintiff's brief after trial poses the issue as follows: "Plaintiff's contention is that the refusal of annual leave for religious observances, when it is permitted for a wide variety of secular purposes, violates his rights under both the First Amendment and Title VII of the Civil Rights Act of 1964." Defendant School Board's brief phrases the issue as follows: This case presents the questions whether the defendant Ansonia Board of Education . . . is obliged under the free exercise clause of the First Amendment and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2 to grant the plaintiff, a public high school teacher, leave with pay to observe religious holy days occurring during the school year."

The union suggests the central question is: "Does a collective labor contract providing that persons are required to work only 182 days per year violate the First Amendment and Title VII of the Civil Rights Act of 1964, where it grants a total of 18 days paid annual leave for various purposes including three days for religious holy days observance and permits additional religious holydays to be taken without pay."

The facts are not in dispute. Plaintiff has been a teacher of business and typing at Ansonia High School since 1962. In 1968 he became a member of the Worldwide Church of God by baptism. As such he must abstain from servile work on certain designated holy days of his church. He identified the holy days

1. Although the right to sue letter refers only to the charge against Ansonia School system its reference numbers are to both the school and the Union.

as The Passover, Days of Unleavened Bread, Days of Pentecost, Feast of Trumpets, Day of Atonement and Feast of Tabernacles. Such days are usually in September and October. The dates of these days, he said, vary from year to year and average about six per year.

1967, not 1968 as plaintiff testified, was the year when the Union (AFT), the bargaining representative of the teachers at Ansonia High School, negotiated the first of a series of contracts between the Ansonia Board of Education and the teachers. (Exhibit 3) There are separate contracts for the succeeding years.

A summary of plaintiff's employment by the school board, the Union's participation as the teachers' representative in labor matters, plaintiff's church affiliation and attendances at religious services, and the various collective bargaining agreements will serve to place the issue in focus.

Plaintiff became a teacher of typing and business at Ansonia High School in 1962. In 1968 he was baptized into the Worldwide Church of God which requires members to refrain from secular work on holy days. These holy days we are told are found in the Old and New Testament of the Bible and do not necessarily fall on the same day each year and are fixed each year by the Church using the Hebrew calendar wherein the new moon is the first day of the month. One of the exhibits in evidence explains this in some detail but not for all of the years involved. There were no specific dates identified by oral testimony and no specific biblical reference given for verification.

Two pamphlets in evidence, *God's Sacred Calendar, 1971-1972* (Exhibit 12) and *Pagan Holidays or God's Holydays "Which"* (Exhibit 13) give some explanation and biblical history but not sufficient to fix with any certainty the days included in the lawsuit nor did plaintiff attempt to identify such holy days for any relevant period although Exhibit 14 contains the days in the years from October 27, 1967 to October 12, 1979.

Prior to the collective bargaining agreement there was a rather loose system of teachers' authorized paid absences for a variety of purposes and some permissible accumulation of unused leave which is not relevant to the issues in this case. In the year 1968, however, the Ansonia Federation of Teachers (Union) was recognized as the exclusive bargaining representative of the teachers and it negotiated the contract which included in

ARTICLE V specific paid leave days applicable to many contingencies. (Exhibit 3) This contract for the school year 1968-1969 has 18 leave days. From a non limit for compulsory attendance in Court, five days for death in the family, three for church religious obligations and three for personal business. All leaves in excess of the allowed leaves subject to $25 a day deduction from pay. We find it appropriate to reproduce ARTICLE V of the 1968-1969 contract and the paragraph in succeeding contracts with reference to Religious Holy days.

1968-1969 Contract

ARTICLE V
LEAVE PROVISIONS

A. Annual Leave

Eighteen (18) days of annual leave cumulative to 150 days shall be granted for personal illness, illness in the immediate family which requires the presence of the teacher, and/or for the reasons, and within the limits stated below:

1. Compulsory court appearance as party or witness .....no limit
2. Death in the immediate family .....5 day limit
3. Funerals
   a) family .....1 day
   b) friend.....1 day per year
4. Attendance of a wedding on a school day .1 day
5. Graduation, ordination, etc.....1 day
6. Official delegate to National Veterans Organization .....3 days per year
7. Religious Holy Days which church laws make obligatory .....3 days per year
8. Legitimate and necessary personal business at the teacher's discretion (but not including marriage or travel for personal or family convenience)..... 3 days per year

For absences for personal illness in excess of accumulated leave, a salary deduction of twenty-five (25) dollars shall be made for each day. Proof of illness may be required by the Board at its discretion.

For absences other than for personal illness and not authorized herein, a salary deduction equal to 1/200th of the annual salary shall be made.

In all instances, reasons for absence shall be reported on appropriate forms. Except in emergencies, applications for leave shall be made at least three (3) days in advance.

B. Sabatical Leave

For the purpose of encouraging professional growth and improvement of the local school program through such growth, the Board shall determine annually the number of teachers who may be absent on sabbatical leave, subject to the following conditions:

All succeeding yearly contracts up to and including June 30, 1985 contain the following paragraph with reference to Religious Holy Days.

> "Absence, not in excess of 3 days per year, for observance of Religious Holidays, which absence is required by and obligatory due to written denominational law shall *be considered as authorized leave and shall not be charged to annual leave, including accumulated days.* No annual leave, including accumulated days, shall be used for absence due to Religious Holidays in excess of three days per year." (Emphasis added)

Plaintiff's complaint filed December 16, 1977 has several different allegations describing his claim.

Under a heading entitled Introduction and Jurisdiction he states "The defendants have caused plaintiff to lose pay for days he is required to be absent from work for religious observances, although no pay is deducted for absences for non religious personal business." Also that "he has for ten years been a baptized member of the Worldwide Church of God . . . that as part of the practice of his religion, plaintiff is required to observe certain annual Holy Days . . . approximately five to ten of these days each will fall on days when school is in session. The plaintiff cannot work on these days and must attend church."

When plaintiff joined the Worldwide Church of God (February 1968) he testified that he was able to use his annual personal leave time for observance of his church holy days. Plaintiff was in error on this score. His error was that he did not become a member of the Worldwide Church of God until February 1968, according to his own testimony, and at that time the Union contract for 1967-1968 provided for only three days religious leave and additional days could not be charged against annual leave. However, by the first Board and Union contract plaintiff has not been permitted to use his personal leave time for religious observances since he became a member of the Worldwide Church of God but is permitted "three days each year for religious observances" and "18 days are permitted for personal and sick leave" and "three days as official delegate to a national veterans' organization" but not to be spent for "religious observances" and an additional three may be spent for "legitimate and necessary personal business at teacher's discretion — [but] "shall not include any religious activity."

The next union negotiated contract for 1969-1970 (Exhibit 4) ARTICLE V, Leave Provisions reads: "absence, not in excess of 3 days per year, for observance of Religious Holidays, which absence is required by and obligatory due to written denominational law shall be considered as authorized leave and shall not be charged to annual leave, including accumulated days. No annual leave, including accumulated days, shall be used for absence due to Religious Holidays in excess of three days per year." Because of the last sentence, plaintiff argues it accommodates Jewish teachers in three holy days but no others who were willing to charge the extra days to personal business or other annual leave category.

In the contract, 1970-1971 (Exhibit 5) plaintiff stresses that a change in ARTICLE V, Leave Provisions relating to personal business namely what we capitalize, "6. Legitimate and necessary personal business at the teacher's discretion, *subject to other* provisions of this Article . . . 3 days per year. Personal business shall not include (without limitation) 1. Any marriage attendance or participation. 2. Attendance at any sport or recreational event. 3. Travel in connection with 1 through 5 above or any travel associated with any activity that does not constitute personal

business. 4. Purposes set forth in 1 through 5 above. 5. ANY RELIGIOUS ACTIVITY."

After 1970-1971 school year to date, the leave provisions have remained the same. The collective bargaining agreements afford all teachers a total of eighteen days of paid leave for illness and other purposes cumulative annually. It should be noted that Boards of Education are required by statute to grant teachers fifteen days of paid leave for absences due to illness cumulative to one hundred and fifty days. Conn. Gen. Stat. §10-156.

Plaintiff admitted that he has not been docked pay since the school year 1976-1977 for any religious observances and that was because his family started to "drool" as he said and he began to compromise. "I would set up an appointment when I should have been in a church observance either in the Veterans Administration Hospital or for other medical reasons or just regular general sickness that may have occurred and schedule them for a religious holy day." He also testified that on some occasions he actually went to work on a religious holy day. He did not know how many and "guessed" approximately 6 or so that may have fallen on school days, and that he has never taken any personal business days for religious observance that he can recall because he was trying to be completely honest with the contract. He could not remember whether he ever took any personal business days for any reason but he was sure he did some time ago. Nor could he remember if he did within the last six to seven years. He admitted that the annual leave is fixed as to the number of days but it can be accumulated and he admitted that as of the time of trial he had accumulated 80 days.

On cross examination he was vague as to where he observed holy days. We quote one answer: "At times in the location of the church where it would meet or at home or if I was to be at the hospital or wherever, I would observe it there." He was specifically asked where in the year 1983 he observed and answered "In Wallingford. We used the school — a couple of them in Meriden, the Junior Middle School." In answer to the question, were there other places, he replied, "There were other places when I was sick. In some cases I went into work." When asked if there was a person in charge at the school in Meriden, he thought it might have been a minister named Mr. Wooldridge but when he was reminded we were talking about 1983 he said

no he walked out and went to work, and then admitted that he did not attend the services in 1983 at the junior high school. He agreed that in the school years of 1976, 1977, 1978 and 1979 he attended only three services each year. He testified that in connection with the Veterans Administration Hospital he was being treated as an outpatient and would make appointments to meet the clinician. Although this would not be attending church services he did not have to do servile work (thus he would not fulfill his church obligation but he would charge it under the collective bargaining agreement. He was not asked if this was fair.

He admitted that between 1974 and 1983 on the occasions when he took more days for religious observance than were permitted by the contract, he was not threatened with any reprisals or dismissals and was unable to tell how much money he lost in pay for the school year 1976 without looking at the documents nor could he remember the number of days that he took as holy days for which he was not paid during the years of 1976, 1975 or 1974, but he allowed that his claim no matter what it was in money, placed an undue burden on him in the practice of his religion.

He also agreed that the statement contained in defendants' Exhibit B, a letter signed by James R. Rosenthal, an official of his church, addressed to him, which states that one of the sanctions against a member of the Worldwide Church of God for not observing religious days, is the loss of eternal life.

A time consuming analysis of exhibits, introduced with no further explanation, of plaintiff's absences from school for years from 1971-1983 reveals an astounding record of 257 absences. It includes 178 days under the category "illness," 8 days for "personal business," 39 days for "religious observances" and 8 being charged under ARTICLE V A 1-5, and only 18 days' pay being deducted amounting to $1,231.84.

But most amazing to us and not a word during trial, is the 178 days absence for "illness" and more particularly the coincidence of number of days each succeeding year — 15, *11*, *11*, 12, *18*, *18*, 17, *18*, 25, *18*, 10, 5 — almost 15 days per year.

The School Board argues that the free exercise of religion is tested in part by "sincerity," and that plaintiff's own testimony showed he was not sincere in his espoused religion. We did not have such impression because we found it very difficult to measure. We have some doubts of his sincerity because of his

vagueness and claimed poor memory of when and where he attended religious services and the absence of witnesses, including his wife. We mean people who saw him and possibly discussed religious matters with him. But we must confess that even with such evidence we would have trouble in making a finding of insincerity. It is such a purely mental experience and mere presence at church or some place of observance cannot be the cue.

We do note, however, that plaintiff resides in Ansonia and the religious services or assemblies he testified he attended were in Wallingford and Meriden schools — each approximately 3/4 of an hour away. But we draw no inference of insincerity without more facts. Neither do we find he was sincere.

In *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) the Supreme Court was confronted with the then accommodation "guideline of the Equal Employment Opportunity Commission (EEOC), 29 CFR § 1605.1(b) (1968)" required, as the Act itself now does by 42 U.S.C. §2000e(j) (1970 ed. Supp. V).

In Hardison the issue also concerned a member of the Worldwide Church of God who by his own choice had changed his working status when he changed his shift. Being on another job in another building he became subject to a different seniority list and was asked to work on Saturdays when another employee went on vacation. TWA asked the Union to seek a change of work assignments for him but the Union was unwilling to violate the seniority provisions of the collective bargaining contract and suggested that Hardison work only 4 days a week. The company rejected the suggestion because he was the only available person on the shift to perform his job and it would not leave the position empty which was critical to airline operations and to employ someone not regularly assigned to work on Saturday would have required it to pay premium wages. When an accommodation was not reached, Hardison refused to report for work on Saturday. After a hearing he was discharged for insubordination. The District Court ruled in a suit brought under Title VII that the Union's duty to accommodate Hardison's Relief did not require it to ignore its seniority system as Hardison appeared to claim. The lower court held that "TWA had satisfied its 'reasonable accommodations' obligation, and any further accommodation would have worked an undue hardship on the company." The Supreme Court agreed with the District Court.

In writing for the Court Mr. Justice White held:

> "We agree that neither a collective-bargaining contract nor a seniority system may be employed to violate the statute, but we do not believe that the duty to accommodate requires TWA to take steps inconsistent with the otherwise valid agreement. Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts. Without a clear and express indication from Congress, we cannot agree with Hardison and the EEOC that an agreed-upon seniority system must give way when necessary to accommodate religious observances. The issue is important and warrants some discussion."
> *id.* at 79 (footnote omitted)

and concluded:

> "As we have seen, the paramount concern of Congress in enacting Title VII was the elimination of discrimination in employment. In the absence of clear statutory language or legislative history to the contrary, we will not readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath."
> *id.* at 85

The free exercise of religion is not subject to arbitrary external power. Plaintiff was not subject to *any* power to attend or not attend any holy day service. He could go without let or hindrance whenever and wherever he wished. He might lose some pay or even his job. The plaintiff did not want it that free. He wanted it to be free as far as his desire or obligation permitted plus pay. This is why he said he did not exercise his "unfettered right to worship, it would cost him money — not that he was prevented." He testified he used to go even after he used his three days but he got tired of having to lose pay for not working.

§2000e-2(j) specifically prohibits an employer granting preferential treatment to any individual because of race, color, religion, etc. But there must be a reasonable accommodation by the

employer, *General Electric Co. v. Gilbert,* 429 U.S. 125 (1977). Congress got the message as it related to Government employees and the next year (1978) it passed and the President approved P.L. 95-390, 5 U.S.C. 5550a, which provides for Government employees' compensatory *"time off"* for religious observances, wherein an employee who *elects to work* certain *overtime* is granted equal compensatory *time off* from his scheduled tour of duty (in lieu of overtime pay) for such religious reasons. In sum, the accommodation is *overtime work* for equal compensatory *time off* — plaintiff agrees with everything except the work part. He received time off after 3 paid days *without pay.*

The Union called all of its present and former officers, most of whom testified that the plaintiff never asked them for any help or advice. But all were willing to help if asked and spoke in favor of increasing the various off free days with pay.

The president, Gleason, was very active in trying to get all different kinds of relief for plaintiff and from the Board of Education — all without success. Including his most recent request for 25 days more of annual leave for all teachers and expansion of the days for religious and secular purposes.

Plaintiff through his Union filed a grievance concerning deductions from his salary for absences over and above the three days for religious observances in the year 1974 totaling $412.05. A hearing in March 1975 by the American Arbitration Association resulted in favor of the School Board.

The action against the individual members of the School Board is not authorized by the Civil Rights Act of 1964, 24 U.S.C. §§2000e *et seq.* They are not plaintiff's employers and there is no allegation or proof that there is diversity of citizenship between plaintiff and any of them. This leaves only the possibility of jurisdiction as against them, the claim that they violated "1983." Assuming that such jurisdiction exists on that theory there was not one iota of proof to support the charge that any such individual defendant member of the School Board committed any constitutional tort against plaintiff or indeed against any one else.

As for the individual Union officers named as defendants they too are not employers of plaintiff. They are officers of the Union and are not proper parties in a Civil Rights Act of 1964 case and of course cannot be sued under a "1983" claim. Most of them testified that they did not even know plaintiff and denied that

they were ever asked by him to do anything for him. There was no allegation or proof of diversity of citizenship as between any of them and plaintiff — only Gleason, President and business agent of the Union, took any active part relating to plaintiff and he did all plaintiff asked and more. On the question of asking for more money he allowed that "fairness in asking for more money is never considered." As to these individual defendant officers of the Union we find that we have no jurisdiction of any kind and the complaint must be dismissed for that reason alone, but if we are in error, the complaint is dismissed for failure to prove any violation under any statute as to them.

It has been suggested that defendants individual members of the School Board have qualified immunity under *Harlow v. Fitzgerald, supra*. That case concerned immunity relating to government officials. But *Wood et al v. Strickland et al,* 420 U.S. 308 (1975), a "1983" action is relevant. We are satisfied that under *Wood* each defendant School Board member has a qualified good faith immunity from liability for damages under both "1983" and the Civil Rights Act of 1964. But they do not need it in this case because plaintiff's case is being dismissed against all defendants for failure of proof.

In sum plaintiff has not been placed by the School Board or any of its members or by the Union or any defendant officers thereof, in a position of violating his religion or losing his job. *Thomas v. Review Board of Indiana,* 450 U.S. 707 (1980); *Sheabert v. Verner,* 374 U.S. 398 (1962) and *Hardison, supra,* and his complaint is dismissed against all defendants for failure to prove by a preponderance of evidence.

Accordingly the Clerk is directed to enter judgment dismissing the complaint and enter judgment for all of the defendants with costs.

Let this Memorandum stand as our findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

Thomas F. Murphy
United States District Judge

Dated: May 18, 1984

Appendix D

ORDER, UNITED STATES SUPREME COURT
SUPREME COURT OF THE UNITED STATES

No. A-130

ANSONIA BOARD OF EDUCATION, ET AL.,

Applicants,

v.

RONALD PHILBROOK

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION
of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 25, 1985.

/s/ Thurgood Marshall
Associate Justice of the Supreme
Court of The United States

Dated this 19th
day of August, 1985